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No. 85-1054

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION, ET AL., PETITIONERS

v.

MISSOURI PACIFIC RAILROAD COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, AND INTERSTATE COMMERCE COMMISSION, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

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STATEMENT

The opinion of the court of appeals (Supp. Pet. App. 1f-10f) is reported at 782 F.2d 107. The district court decision (Pet. App. 1c-37c) is reported at 580 F. Supp. 1490. The judgment of the court of appeals (Supp. Pet. App. 1g) was entered on January 15, 1986. The petition for a writ of certiorari before judgment (Pet.) was filed on December 19, 1986.

Petitioners' supplemental brief (Supp. Pet.) was filed and received by the Commission on January 31, 1986. By order of Chief Deputy Clerk Lorson, respondent Interstate Commerce Commission was given until 30 days from receipt of the supplemental brief

to respond to the petition, as modified by the supplemental brief. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

The facts of this case have been repeatedly set forth in the petition and supplemental petition in this proceeding and the petitions, cross-petitions and replies thereto in Nos. 85-792, 85-793, 85-983 and 85-997. There is no real disagreement among the parties concerning the essential facts and hence they will not be reiterated here.

This case involves the effect to be given Interstate Commerce Commission approval of a trackage rights agreement as a condition upon Commission approval of a rail consolidation. The trackage rights in question were imposed to permit the grantee of the trackage rights to compete with the consolidated carriers. In issue are the effects of Commission approval upon the rights of employees of one of the consolidating carriers to resort to a strike in an attempt to obtain alteration of a material term of the imposed trackage rights arrangement.

The courts below held, as principally relevant to this appeal, that (1) the term of the agreement in question was not negotiable and hence resort to self-help to force negotiations was unjustified, and (2) an injunction to prevent resort to self-help under these circumstances was appropriate and not barred by the Norris-LaGuardia Act (29 U.S.C. § 101 *et seq.*).

This case is related to but presents a substantial number of issues beyond those presented by the petitions for writs of certiorari in No. 85-792 and 85-793. It also raises issues beyond those presented by petitioners' cross petition in No. 85-983 and the cross petition of the Brotherhood of Locomotive Engineers in No. 85-997. Respondent Commission has urged

this Court not to grant those cross-petitions because doing so would unnecessarily broaden the issues. That objection is even more valid here. Indeed, as petitioners recognize (Pet. 15-17), they seek to obtain a resolution of issues which need only be reached after the issue presented in the related *BLE* proceedings is resolved.

The Commission agrees with petitioners in this proceeding that a favorable decision by this Court in No. 85-792 will not finally dispose of all issues relating to the effect of Commission approval of the numerous transactions, for which approval is required, upon labor management relations in the rail industry. But, the Commission does not agree that such an all-encompassing resolution should be attempted at this juncture. The desirability of a total resolution, in the view of the Commission, is outweighed by the enormous expansion of issues and increase in complexity of the proceeding that a grant of certiorari in this proceeding and consolidation of this proceeding with *BLE* would engender.

The decisions of the courts below, which petitioners seek to bring before this Court, recognize the interrelationships between the central question presented in No. 85-792 (the effect of Commission approval of a transaction upon any and all impediments to its consummation) and the questions posed by petitioners in their petition for *certiorari* in this proceeding (rail labor's rights to strike and rail management's right to an injunction against such a strike. However, the courts concluded, properly in the Commission's view, that the answer to the principal issue concerning the effect of Commission approval of the transaction was dispositive of the subsequent right to strike issues. Even if a proper resolution of the issue presented in

No. 85-792 is not dispositive of the right to strike issues, it should at least inform their resolution. This Court's decision in the *BLE* proceedings now before it will provide the necessary guidance.

ARGUMENT

The judgments of the courts below are correct and do not conflict with any decisions of this Court. Further review is not warranted.

(1) Petitioners assign (Supp. Pet. 5-6) the inconsistent results in the circuit court below and the circuit court deciding the *BLE* case as a reason for granting certiorari in this case, even if this Court denies certiorari in *BLE*. But the inconsistent results are based on the fact-bound and judgmental issue of what constitutes an adequate finding of necessity to activate the exemption from other laws provided by 49 U.S.C. 11341(a). Such differences do not rise to the level of a split in the circuits requiring intervention by this Court.[1] Moreover, if the Commission's contention in No. 85-792—that the exemption provided by Section 11341(a) is self-executing—is sustained, the finding issue becomes irrelevant.

(2) Similarly, petitioners' other alleged problems (Supp. Pet. 6-7) concerning the appropriate tribunal (district court or Commission) to make the necessity finding and the proper forum to review that finding are irrelevant if no such finding is required. Even if such a finding is required, the problems are no

[1] Petitioners appear to acknowledge (Pet. p. 6) that the right of the competing railroads DRGW and MKT to use their own crews was a material item of the trackage rights conditions; and as far as MKT was concerned that this was evidenced by the fact that MKT's entire case before the Commission was premised upon such crewing.

different than those in any other area involving shared jurisdiction between United States District Courts and the Commission, for example such as in the area of enjoining unlawful abandonments and determining which pre-abandonment cessations of service are justified. See *Chicago & N.W. Tr. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 322-23 (1981).

(3) Contrary to Petitioners' claims (Pet. 15-16, 18-23, Supp. Pet. 7-9), the district court's injunction neither violates any Constitutionally protected rights of petitioners nor conflicts with any decisions of this Court.

The First Amendment does not confer an absolute right to strike upon labor unions. This Court has long recognized that the First Amendment's guarantees of free speech and assembly have an important role to play in labor disputes. *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940); *Thomas* v. *Collins*, 323 U.S. 516, 532 (1945). But this freedom of speech and assembly is always subject to the exercise of governmental regulation and control in the interest of the public welfare. Not all speech or assemblage is protected. See *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942); *Schneck* v. *United States*, 249 U.S. 47 (1919); *cf. Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). Thus, an injunction can issue after the moving party shows that the conduct to be enjoined is illegal and that the defendant, if not enjoined, will engage in such conduct. *United Transportation Union* v. *Michigan Bar*, 401 U.S. 576, 584 (1970).

It is well-established that Congress has the power to regulate labor relations in interstate industries and adopt all appropriate measures to "facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation." *Texas & N.O.R. Co.* v. *Railway Clerks*,

281 U.S. 548, 570 (1930). "Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained." *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, 233 (1956). Nowhere is this more true than in the railroad industry, as many of petitioners' cited cases recognize. See also *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry.*, 314 F.2d 424, 430-31 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963), relying upon and analyzing decisions of this court in *Brotherhood of Maintenance of Way Employees* v. *United States*, 366 U.S. 169 (1961); *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142 (1950); and *United States* v. *Lowden*, 308 U.S. 225 (1939). As relevant to this proceeding, Congress determined that the Interstate Commerce Commission would have exclusive and plenary jurisdiction over rail mergers pursuant to 49 U.S.C. 11343, and would determine the level of protection for employees adversely affected by the approved mergers. *Norfolk & W.R.R. Co.* v. *Nemitz*, 404 U.S. 37 (1971), *reh. den.*, 404 U.S. 1026 (1971).

In this case, MP employees seek the economic self-help of a strike to force MP to negotiate with DRGW and MKT crewing provisions in the trackage rights granted by the Commission, despite the fact that the Commission's order provided that MKT and DRGW could operate such rights utilizing their own crews. Thus, unlike the situation in *Order of Railroad Telegraphers* v. *Chicago & N.W.R.R. Co.*, 362 U.S. 330, 340 (1960), relied on by petitioners throughout their petition and supplemental brief (Pet. 17-23; Supp. Pet. 8), the conduct sought to be compelled by resort to a strike would have required MP to violate the

valid order of the Commission.[2] Under these circumstances, petitioners acknowledge (although they disagree) (Pet. 20) that the court below could validly conclude that the enjoined union conduct would be unlawful.

Petitioners, nonetheless, argue (Pet. 20) that the Norris-LaGuardia Act's ban on injunctions (29 U.S.C. 108) is not lifted because the unions' conduct would violate some other non-labor statute, citing *Railroad Telegraphers, supra.* However, the courts below properly noted that the statement relied upon in *Railroad Telegraphers* is *dicta* and that, while the labor protective provisions of the Interstate Commerce Act were not enacted as part of a piece of labor legislation, those provisions do confer upon the Commission jurisdiction over resolution of labor disputes in connection with rail consolidations (580 F. Supp. at 1506; Pet. App. 28c). None of the cases cited by petitioners addresses this question in the context of violating the labor provisions of the Interstate Commerce Act or a Commission order thereunder; and counsel could find none. The decision of this Court most closely on point, *Nemitz, supra,* supports the reasoning of the courts below.

As to Petitioners' Thirteenth Amendment argument, the district court (Pet. App. 3b) properly found that there is no involuntary servitude:

> Defendant's thirteenth amendment argument must also be rejected. The injunction amendment prohibits involuntary servitude. The in-

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[2] There can be no doubt about the validity of the Commission's order; it was approved in all material respects by the United States Court of Appeals for the District of Columbia Circuit in *Southern Pac. Transp. Co. et al. v. I.C.C.*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 1171 (1985).

junction herein does not compel any employee to work against his will, nor does it prohibit any employee from voluntarily quitting. The injunction only prohibits work stoppages arising out of the matters in dispute in this litigation. Therefore, the injunction does not violate the thirteenth amendment. *See United States v. Martinez*, 686 F.2d 334, 345-46 (5th Cir. 1982); *New Orleans Steamship Ass'n v. General Longshore Workers*, 626 F.2d 455, 463 (5th Cir. 1980), *aff'd sub. nom., Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n.*, —— U.S. ——, 102 S. Ct. 2673 (1982).

The district court, therefore, properly enjoined the unions from striking against MP and thereby violating a valid Commission order.

CONCLUSION

For the reasons set forth above, further review of the issues sought to be brought before this Court by the petition for certiorari in this proceeding is not warranted. The petition for writ of certiorari should be denied or alternatively held pending resolution of the issues presented in the petitions pending before the Court in Nos. 85-792 and 85-793.

Respectfully submitted,

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